

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JANET D. PRATT

Claimant

VS.

RAYTHEON AIRCRAFT CO.

Self-Insured Respondent

Docket No. **265,211**

ORDER

Claimant requests review of the February 14, 2001 Award by Administrative Law Judge John D. Clark. The Board heard oral argument on June 7, 2011.

APPEARANCES

E.L. "Lee" Kinch of Wichita, Kansas, appeared for the claimant. Clifford Stubbs of Wichita, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

It was undisputed claimant suffered bilateral carpal tunnel injuries as a result of her work for respondent. But claimant additionally alleged injuries to her neck, bilateral shoulders and thoracic spine. As a consequence of her injuries claimant argued she was permanently and totally disabled.

The Administrative Law Judge (ALJ) found claimant failed to meet her burden of proof that she suffered work-related injuries to her neck, bilateral shoulders or thoracic spine and limited her award to a 10 percent scheduled disability to the left arm and a 20 percent scheduled disability to the right arm due to bilateral carpal tunnel syndrome.

Claimant requests review of the nature and extent of disability. Claimant argues her bilateral carpal tunnel syndrome injuries raise a presumption of permanent total disability which has not been rebutted. In the alternative, claimant argues she also suffered

permanent injury to her neck, bilateral shoulders and thoracic spine and as a result of all her injuries she is unable to engage in substantial gainful employment.

Respondent argues the claimant failed to meet her burden of proof that she suffered any work-related injuries other than bilateral carpal tunnel syndrome. Respondent further argues the presumption of permanent total disability was rebutted as claimant retains the ability to engage in substantial gainful employment. Respondent also argues claimant failed to provide timely notice or timely application for hearing for the alleged neck, bilateral shoulder and thoracic spine injuries. Consequently, respondent requests the Board to affirm the ALJ's Award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds the ALJ's findings and conclusions are accurate and supported by the law and the facts contained in the record. It is not necessary to repeat those findings and conclusions in this Order. The Board approves those findings and conclusions and adopts them as its own.

Initially, claimant argues that she sustained permanent injuries to her bilateral shoulders, neck and thoracic spine. Only her medical expert, Dr. Flutter, opined that she suffered work related injuries to those areas of her body. It was undisputed claimant sustained bilateral carpal tunnel syndrome performing her work for respondent. She was provided a lengthy course of medical treatment for her complaints. Surgery for her bilateral carpal tunnel syndrome was refused by the claimant on several different occasions. Early in her treatment she had cervical complaints which were evaluated by Dr. J. Mark Melhorn but determined to be unrelated to her employment. A second opinion was obtained from Dr. Pedro A. Murati who also diagnosed bilateral carpal tunnel syndrome as well as probable right and left cubital tunnel syndrome. Dr. Murati's examination did not reveal any findings regarding injury to claimant's shoulders, neck or back.

Claimant then sought and was provided treatment from numerous other physicians from 2000 through 2007. She was not diagnosed with injuries to her shoulders, neck or thoracic spine. It was not until May 15, 2007, that Dr. George G. Flutter, claimant's medical expert, diagnosed claimant with injuries to her neck and shoulders. But Dr. Flutter had earlier examined claimant on January 11, 2007, and at that time only found permanent impairment and provided ratings for claimant's bilateral upper extremities.

At respondent's insurance carrier's request, claimant was examined on March 5, 2009, by Dr. John F. McMaster, board certified in family practice and emergency medicine. The doctor reviewed claimant's numerous medical records and also took a history

regarding her accidental injury. Upon physical examination, Dr. McMaster found: (1) claimant's head, neck and upper extremities identified normal muscle contour; (2) no evidence of warmth, erythema or atrophy was evident; (3) palpation of the head, neck, shoulders and upper extremities revealed no specific areas of point tenderness or reproducible areas of pain; and, (4) range of motion of the head, neck, shoulders and upper extremities both passive and active were within normal limits without evidence of impairment. Based on the *AMA Guides*¹, Dr. McMaster rated claimant's left wrist at 10 percent due to mild impairment of the median nerve and 20 percent to the right wrist due to a moderate impairment.

Dr. Melhorn, board certified in orthopedic surgery with an added qualification in hand surgery, examined and evaluated claimant on June 19, 2000, at respondent's request. The doctor had claimant complete a white drawing indicating her symptomatology and locations. Claimant was complaining of pain in both of her hands. Upon physical examination, Dr. Melhorn noted that claimant's objective/subjective findings demonstrated clinical components that were consistent with the diagnosis of carpal tunnel and supported by her nerve conduction study. At that time Dr. Melhorn was also asked about claimant's cervical complaints. Dr. Melhorn testified:

Q. Did you also look at her neck?

A. Yes.

Q. What did you note of relevance with regard to her neck or cervical spine?

A. As indicated in my notes, on the x ray of the cervical spine there is some change at C5-6, which in my opinion would be a normal anatomical presentation for an individual in this age category. I also state in my notes it does not appear to be a contribution to her current symptoms.²

Dr. Melhorn opined claimant had mild arthritic changes with regard to the cervical spine without significant change. At a later examination of claimant on October 24, 2008, the doctor found his clinical diagnosis was unchanged. The doctor opined claimant's left and right carpal tunnel was consistent with a condition that could have been either aggravated or exacerbated by her work activities through June 13, 2000. Dr. Melhorn testified that claimant's arthritis with regard to her thumb, shoulder and cervical spine were not a direct result of her work activities. The doctor recommended surgery which would have decompressed the nerve to reduce pressure and he believed the surgery would have prevented her progression to the current level. Based on the *AMA Guides*, Dr. Melhorn

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *AMA Guides* unless otherwise noted.

² Melhorn Depo. at 9-10.

rated claimant's bilateral carpal tunnel at 7.75 percent to each upper extremity at the forearm.

The ALJ analyzed the opinions of the three testifying physicians and noted that from the time claimant was last employed by respondent in 2000 she had worked for seven different employers and had seen numerous physicians before Dr. Fluter's diagnosis in 2007 which related her cervical, shoulder and thoracic complaints to her repetitive work activities for respondent. The ALJ concluded that the opinions of Drs. Melhorn and McMaster were more persuasive that the injuries claimant suffered working for respondent were limited to her bilateral carpal tunnel injuries. The Board agrees and affirms.

Claimant next argues that she is permanently and totally disabled. It was undisputed that claimant suffered bilateral upper extremity injuries. In *Casco*³ it was stated:

Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.

When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.

When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof and the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in some type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability in accordance with the K.S.A. 44-510d.⁴

Under the *Casco* analysis the calculation of claimant's benefits begins with a determination of whether the claimant has suffered a permanent total disability. And because in this case the claimant has suffered permanent impairment to both upper extremities there is a presumption of permanent total disability.

³ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, rehearing denied (May 8, 2007).

⁴ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508 at Syl ¶ 7-9.

At respondent's attorney's request, Mr. Steven Benjamin, a vocational counselor, interviewed claimant on September 17, 2010. Claimant provided her education and employment history in the 15 years before her accident on June 13, 2000. Mr. Benjamin noted claimant had worked for various employers since she stopped working for respondent. Mr. Benjamin opined claimant was employable in the open labor market within Drs. Melhorn's and Fluter's restrictions.

At the request of claimant's counsel Doug Lindahl, a vocational rehabilitation counselor, interviewed claimant in person on April 12, 2007, and then conducted an additional telephone interview on April 13, 2007. Mr. Lindahl reviewed the average weekly wage information and Dr. Fluter's report dated January 11, 2007. He took claimant's work history and then prepared a list of 27 tasks and the physical requirements for jobs claimant had performed in the 15 years before claimant's injury. At the time of the interview, claimant was earning \$50 a week as a substitute teacher for U.S.D. #259. Mr. Lindahl testified that based on claimant's education, work history, permanent physical restrictions and job skills she would be able to earn from minimum wage to \$11.25 an hour.

At the request of claimant's attorney, Mr. Lindahl interviewed claimant again on October 14, 2009, due to the additional restrictions placed on claimant by Dr. Fluter. Mr. Lindahl reviewed Dr. Fluter's reports dated May 15, 2007 and August 13, 2009. Based on the additional information, Mr. Lindahl opined that claimant was essentially and realistically unemployable and that she should contact Social Security for an application.

It is significant to note that when Mr. Lindahl first evaluated claimant he concluded she was capable of employment in the open labor market and would be able to earn from a minimum wage to \$11.25 an hour. It was not until Dr. Fluter added the additional restrictions for claimant's alleged cervical, shoulder and thoracic injuries that Mr. Lindahl changed his opinion. As previously discussed, those additional alleged injuries were not the result of claimant's employment with respondent. Consequently, the testimony of both vocational experts confirms that claimant's bilateral carpal tunnel injuries do not prevent her from engaging in substantial gainful employment and rebut the presumption that she is permanently and totally disabled. And *Casco*⁵ directs that if there is evidence that the claimant is capable of engaging in some type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability in accordance with the K.S.A. 44-510d. Accordingly, the Board affirms the ALJ's Award in all respects.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁶ Accordingly, the findings

⁵ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508 at Syl ¶ 7-9.

⁶ K.S.A. 2010 Supp. 44-555c(k).

and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge John D. Clark dated February 14, 2011, is affirmed.

The Board notes that the ALJ did not award claimant's counsel a fee for his services. The record does not contain a fee agreement between claimant and her attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

IT IS SO ORDERED.

Dated this _____ day of July, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: E.L. Lee Kinch, Attorney for Claimant
Clifford Stubbs, Attorney for Respondent
John D. Clark, Administrative Law Judge